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Perbadanan Bekalan Air Pulau Pinang Sdn Bhd v Lingkaran Luar Butterworth (Penang) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01–56–02 OF 2014
ABDUL WAHAB PATAIL, LINTON ALBERT AND BADARIAH SAHAMID JJCA
2 JULY 2015

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Road Traffic — Road — Claim — Pipes supplying treated water would be buried under embankment — Possibility of damages — Plan to relocate affected pipes carried out — Claim for payment refused by highway concessionaire — Whether there was a need to relocate pipes from original location — Whether highway concessionaire obliged to bear the costs of relocating pipes — Whether costs of relocation claimed fair and reasonable

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The plaintiff was a company that supplied treated water and related services in Penang while the defendant was a highway concessionaire responsible for the construction of highway and toll plazas in respect of a project ('the project'). Sometime in May 2005, the plaintiff discovered that in the course of the defendant undertaking the project, the pipes of the plaintiff would be buried under the embankment. Structures of the plaintiff would be built over the pipes with the possibility of causing damage to the pipes. The defendant's project would adversely affect the plaintiff's supply of treated water and any remedial works would be lengthy and costly. The plaintiff suggested a plan to relocate the affected pipes and when the works were completed, the plaintiff presented the defendant with a bill for a sum of RM1,915,947.71. The plaintiff agreed to undertake partial payment of the cost of relocation of pipes in the sum of RM408,026.16. The balance of the amount claimed by the plaintiff for the relocation of the pipes was in the sum of RM1,507,921.55. However, the defendant refused to pay the said amount. The issues raised in the High Court were whether there was a need to relocate the pipes from their original location; whether the defendant was obliged to bear the costs of relocating the pipes; and whether the costs of relocation claimed by the plaintiff were fair and reasonable. The High Court allowed the claim in part to the extent of RM448,657.58, interest and cost of RM20,000. Hence, the present appeal.

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Held, allowing the appellant's appeal on quantum and dismissing the respondent's cross-appeal on liability:

(1) There was sufficient evidence that the relocation of pipes from the original site under the highway and toll plazas was a necessary precaution, taking into account the particular circumstances and the potential adverse consequences to the public caused by damage to the underground pipes. In the light of the essential public service provided by the appellant, the relocation was a necessary precaution. The costs incurred were necessary and the respondent as concessionaire had the obligation to pay the costs incurred by the appellant. The High Court's finding of liability against the respondent was affirmed (see paras 41–42).

(2) The appellant's appeal on quantum was allowed and the amount awarded was revised upwards to include one additional amount for the cost of pipes in the sum of RM585,600. There was credible evidence that the amount had been proven by the evidence that the pipes purchased by the appellant cost RM1,600 per metre and that the actual length used by the appellant was 516 metres (516 x RM1,600 = RM825,600). From this amount a sum of RM240,000 was deducted (see para 43).

[Bahasa Malaysia summary

Plaintif adalah syarikat yang membekalkan air bersih dan perkhidmatan yang berkaitan di Pulau Pinang sementara defendan adalah syarikat konsesi lebuh raya yang bertanggungjawab untuk pembinaan lebuh raya dan plaza tol berkaitan projek ('projek'). Dalam bulan Mei 2005, plaintif mendapati bahawa dalam perjalanan defendan melaksanakan projek tersebut, paip plaintif akan ditanam di bawah benteng. Struktur plaintif akan dibina atas paip-paip dengan kemungkinan menyebabkan kerosakan kepada paip-paip tersebut. Projek defendan akan menjejaskan bekalan air bersih oleh plaintif dan apa-apa kerja remedi akan berpanjangan dan mahal. Plaintif mencadangkan pelan untuk menempatkan semula paip-paip yang terjejas tersebut dan apabila kerja selesai, plaintif mengemukakan kepada defendan bil untuk sejumlah RM1,915,947.71. Plaintif bersetuju untuk membayar sebahagian daripada kos penempatan semula paip-paip dalam jumlah RM408,026.16. Baki jumlah yang dituntut oleh plaintif untuk penempatan semula paip-paip adalah dalam jumlah RM1,507,921.55. Walau bagaimanapun, defendan enggan untuk membayar jumlah tersebut. Isu-isu yang dibangkitkan di Mahkamah Tinggi adalah sama ada perlu untuk menempatkan semula paip-paip daripada lokasi asal; sama ada defendan bertanggungjawab untuk menanggung kos penempatan semula paip-paip; dan sama ada kos penempatan semula yang dituntut oleh plaintif adalah adil dan munasabah. Mahkamah Tinggi membenarkan sebahagian tuntutan sejumlah RM448,657.58, faedah dan kos sebanyak RM20,000. Maka, rayuan ini.

Diputuskan, membenarkan rayuan perayu atas kuantum dan menolak rayuan balas responden atas liabiliti:

(1) Terdapat keterangan mencukupi bahawa penempatan semula paip-paip

daripada tapak asal di bawah lebuh raya dan plaza tol adalah langkah berjaga-jaga yang perlu, mengambil kira keadaan tertentu dan akibat bertentangan yang berpotensi kepada orang awam disebabkan oleh kerosakan kepada paip-paip bawah tanah. Berdasarkan perkhidmatan awam yang penting diperuntukkan oleh perayu, penempatan semula adalah langkah berjaga-jaga yang perlu. Kos yang ditanggung adalah perlu dan responden sebagai konsesi mempunyai tanggungjawab untuk membayar kos yang ditanggung oleh perayu. Dapatan Mahkamah Tinggi atas liabiliti terhadap responden disahkan (lihat perenggan 41–42).

(2) Rayuan perayu atas kuantum dibenarkan dan jumlah dinaikkan untuk memasukkan satu jumlah tambahan bagi kos paip-paip dalam jumlah RM585,600. Terdapat keterangan boleh dipercayai bahawa jumlah telah dibuktikan oleh keterangan bahawa paip-paip yang dibeli oleh perayu berjumlah RM1,600 semeter dan bahawa panjang sebenar yang digunakan oleh perayu adalah 516 meter (516 x RM1,600 = RM825,600). Daripada jumlah ini sejumlah RM240,000 dikurangkan (lihat perenggan 43).]]

Notes

For cases on road in general, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 600–604.

Cases referred to

Autoclenz Ltd v Belcher & Ors [2010] IRLR 70, CA (refd)

Appeal from: Civil Suit No 22–631 of 2010 (High Court, Pulau Pinang)

Yuslinov bt Ahmad (Sakthi Malar Selvi a/p Perumal K with her) (Yuslinov Ahmad & Petra Oon) for the appellant.
Muralee Nair (Alexius Lee with him) (Idris & Assoc) for the respondent.

Abdul Wahab Patail JCA:

INTRODUCTION

[1] The appeal and cross appeal before us arises from a decision of the learned judicial commissioner ('JC') who on 3 January 2014 had allowed in part the claim of the plaintiff to the extent of RM448,657.58, interest and cost of RM20,000.

[2] The plaintiff had claimed the sum of RM1,507,921 for the costs incurred by the plaintiff in relocating the plaintiff's underground water pipes

('the pipes') as a consequence of the defendant's work carried out in relation to the Butterworth Outer Ring Road Project ('the project').

[3] The appeal by the plaintiff/appellant before us is premised on the quantum of damages awarded to the plaintiff by the learned JC. The damages awarded are RM825,600 less than the amount sought for in the plaintiff's statement of claim. Further the reduced amount has resulted in a consequent reduction in respect of 7.5% of supervision charges allowed.

[4] The plaintiff/appellant is not appealing against the other items reduced or rejected by the learned JC.

[5] The defendant/respondent has also filed a cross-appeal against the learned JC's decision in finding liability against the defendant and allowing the plaintiff's claim in part to the extent of RM448,657.58, interest and cost of RM20,000.

[6] For clarity, we will address the issue of liability raised by the respondent's cross appeal before considering the issue of quantum of damages awarded raised by the appellant in the main appeal.

BRIEF BACKGROUND

[7] The plaintiff is a limited company which is licensed to supply treated water and related services in Penang. The defendant is a highway concessionaire responsible for the construction of highway and toll plazas in respect of a project known as the Butterworth Outer Ring Road Project ('the project').

[8] Sometime in May 2005, the plaintiff discovered that in the course of the defendant undertaking the project, the pipes of the plaintiff would be buried under the embankment. Further, structures of the plaintiff would be built over the pipes with the possibility of causing damage to the pipes.

[9] The defendant's project would adversely affect the plaintiff's supply of treated water and any remedial works would be lengthy and costly.

[10] A joint site visit was held on 10 May 2005 where the plaintiff had raised these concerns with the defendant and suggested a plan to relocate the affected pipes. A further joint site visit was held on 27 September 2005 and meetings were held to discuss the costs of relocation of the pipes.

[11] The plaintiff appointed Sykt Sri Bina to undertake works in relation to the relocation of the pipes. The works were completed on 1 March 2006. The plaintiff presented the defendant with a bill dated 9 November 2006 for a sum of RM1,915,947.71.

[12] After discussion, the plaintiff agreed to undertake partial payment of the cost of relocation of pipes in the sum of RM408,026.16.

[13] The balance of the amount claimed by the plaintiff for the relocation of the pipes was in the sum of RM1,507,921.55. However, the defendant has refused to pay the plaintiff the abovementioned amount.

ISSUES

[14] The issues before the High court may be summarised as follows:

(a) whether there was a need to relocate the pipes from their original location?;

(b) whether the defendant is obliged to bear the costs of relocating the pipes?; and

(c) whether the costs of relocation claimed by the plaintiff are fair and reasonable?

THE PLAINTIFF'S SUBMISSIONS

Necessity to relocate pipes

[15] The plaintiff's contention is that there was a necessity to relocate the pipes from their original location under the Projek Plaza Toll 3C, as the works of the defendant on the site of the pipes would cause the pipes to be buried deeper into the ground. This might damage the pipes. Any remedial works would be lengthy and costly and may pose safety issues.

[16] The structural works of the defendant would also pose a problem in the maintenance of the pipes. Exhibit P18 shows a total of nine toll booths in the middle of the highway at the site of the pipes.

The defendant's obligation to bear costs of relocation

[17] The plaintiff had raised the issue of payment for relocation of pipes by the plaintiff in numerous correspondences. Joint site visits as well as meetings had been held with the attendance of representatives of both parties. At a meeting on 27 September 2005, the plaintiff and the defendant had discussed the plan to relocate the pipes as well as access to the workers of the defendant

to enter the site in order to undertake the relocation works. The plaintiff had never objected to the entry of the plaintiff's workers in order to relocate the pipes. By their conduct the defendant had acknowledged their obligation in the relocation of the pipes.

(*Autoclenz Ltd v Belcher & Ors* [2010] IRLR 70)

Costs of relocation of pipes

[18] The plaintiff's had informed the defendant by a letter dated 20 July 2005 (exh P3) that the cost of relocation of pipes is RM1,915,947.71 (exh D15). This amount was then reduced to RM1,507,921.55 (exh P24) after a deduction of RM408,026.16, which is the costs of laying the pipes in the area of the Chung Hwa school (exh D16).

[19] To summarise the breakdown of the plaintiff's claim for the relocation of pipes in the sum of RM1,507,921.55 are as follows:

(a) costs of laying pipes	RM825,600
(b) costs to relocate pipes	RM578,010
(c) survey costs	RM7,372.05
(d) pre-preparation costs	RM14, 839.50
(e) overheads	RM356,455.39
(f) supervision costs 7.5%	RM133,670.77

THE DEFENDANT'S REPLY

[20] The plaintiff had not adduced any technical or engineering studies to support the plaintiff's contention that there was a necessity to relocate the pipes. The plaintiff's concerns of the risks of damage to the pipes were mere conjecture, assumptions and speculation without any supporting technical data as evidence.

[21] The defendant's embankment works which is a source of concern to the plaintiff was only a temporary embankment for a period of six months and ultimately would only raise the level by a further 0.5m above the existing level.

[22] The pipes are located at a site of the toll plaza where there are no structures, and can be accessed directly for repair or maintenance works on pipes. There is no evidence of damage to the existing pipes under the highway and toll plaza.

[23] There are no legal provisions prohibiting the pipes from being laid under the highway or toll plaza area.

[24] The pipes have been relocated to a residential area, which is densely populated and may cause greater damage compared to the original location of the pipes in the highway which is less dense and unimpeded.

[25] The plaintiff had unilaterally decided to relocate the pipes based on their own requirements and is attempting to shift the responsibility for the relocation costs on the defendant.

[26] At no time did the defendant agree to the relocation of the pipes or to bear the costs of relocation. The defendant had notified the plaintiff as early as 13 June 2005 of its disagreement to the relocation (exh D34). Subsequent meetings, site inspection and correspondences were intended to co-ordinate relocation works but cannot be taken to demonstrate the plaintiff's agreement to the relocation.

[27] The plaintiff's claim is baseless as it is not premised on any statutory provision, tort or contract.

[28] The costs of relocation of the pipes claimed by the plaintiff is excessive and not proven. The plaintiff had initially sought to claim RM1,915,947.71 which included the Chung Hwa school portion but was later reduced to RM1,507,921.55 after the defendant's objection.

[29] In the alternative, the quantum of damages awarded, if at all should be revised to RM381,029.33 which comprises the following:

(a) costs to relocate pipes	RM347,073.84
(b) survey costs	RM7,372.05
(c) supervision costs	RM26,583.24
Total costs	RM381,029.33

DECISION OF JUDICIAL COMMISSIONER (JC)

[30] The learned JC had allowed in part the claim of the plaintiff to the extent of RM448,657.58, interest and cost of RM20,000. The reasons for her decision may be summarised as follows.

[31] Exhibit P18 shows nine structures on the toll booths where the underground pipes are located.

[32] SP1 had testified that the works carried out by the defendant to raise the level of the embankment to a height of two metres using 25 ton heavy machinery, can cause damage to the underground pipes. Any necessary repair

of the pipes would be time consuming and costly. It would also adversely affect the highway users. Thus the concerns raised by the plaintiff are well founded.

[33] The defendant, as concessionaire under the concession agreement between the defendant and the Government of Malaysia, did not take steps to inspect the site and discuss with the plaintiff regarding the existing pipelines within the concession area. It was the plaintiff who had taken the initiative to raise the concerns on the damage to the pipes due to the works on the highway.

[34] The defendant had admitted in their defence that based on the concession agreement, the defendant has the responsibility to relocate the pipes and to bear the costs incurred. Since the relocation works had been undertaken by the plaintiff instead, the plaintiff is entitled to be paid the costs of the relocation.

[35] The plaintiff is entitled to the following costs.

(a) costs of relocation	RM409,983.43
(b) survey costs	RM7,372.05
(c) Supervision costs 7.5%	RM31,301.69
Total costs awarded	RM448,657.58

[36] The following costs were rejected by the learned JC as unproven:

(a) cost of pipes	RM825,600
(b) pre-preparation costs	RM14,839
(c) on costs	RM356,455.39

[37] The JC rejected the cost of pipes on the grounds that exh P19 which referred to pipes of 1350mm was obtained from the plaintiff's store on 2 September 2005. However, according to exh P30, the quotation of the purchase price of the pipes was dated 20 October 2006, after the relocation works were completed. There is uncertainty as to whether the cost of the pipes is the same in the two different periods mentioned.

[38] The plaintiff had also failed to explain what is meant by pre-preparation costs. Exhibit P32 (project costing) failed to itemise the pre-preparation costs.

[39] The plaintiff is only entitled to charge on costs if the plaintiff had undertaken the relocation works themselves. Since the same was undertaken by Sykt Sri Bina, who was appointed by the plaintiff, the plaintiff cannot claim this category of costs.

GROUNDS OF DECISION

[40] After careful consideration of the oral and written submissions of the plaintiff/appellant and the defendant respondent as well the records of appeal, we dismissed the respondent's cross-appeal on liability.

[41] We are in agreement with the learned JC that there is sufficient evidence to find that the relocation of pipes from the original site under the highway and toll plazas was a necessary precaution, taking into account the particular circumstances and the potential adverse consequences to the public caused by damage to the underground pipes.

[42] In the light of the essential public service provided by the appellant, it is our opinion that the relocation was a necessary precaution. The costs incurred are necessary and the respondent as concessionaire has the obligation to pay the costs incurred by the appellant. Thus we affirm the learned JC's finding of liability against the respondent.

[43] However, we allowed the appellant's appeal on quantum and revised the amount awarded upwards to include one additional amount for the cost of pipes in the sum of RM585,600 for the following reasons. We find credible evidence that the abovementioned amount had been proven by the evidence of SP6 who testified that the pipes purchased by the appellant cost RM1,600 per metre and that the actual length used by the appellant was 516 metres (516 x RM1,600 = RM825,600). From this amount a sum of RM240,000 is deducted ('the Chung Hua school portion').

[44] We are satisfied that there is no uncertainty in the price of the pipes arising from the differing references to the pipes. SP7 had testified that the size 1350 mm DN and 1422mm OD are the same pipes and that the letters OD represent 'outer diameter' and DN, 'diameter nominal'. SP7 had also testified that the same pipes were used in the relocation works.

[45] As a result of the revision in the quantum awarded, we also allow supervision costs of 7.5% to be recalculated on the revised amount.

Appellant's appeal on quantum allowed and respondent's cross-appeal on liability dismissed.

Reported by Afiq Mohamad Noor